United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-7233

United States Court of Appeals
FOR THE SECOND CIRCUIT

EARL B. LEWIS, HERBERT D. PARSONS, ROBERT J. C. MURRAY, RUTHVEN H. LEE, CLARENCE T. CHLADEK, ROBERT C. ARCH, HARRY L. DAVIS, "O" "C" SMITH, KENNETH TAYLOR, FRANCIS C. KOPAS, JAMES H. RICHMOND, JR., CULVER Q. HOLT, WILLIE P. JACQUET, ANTHONY ALVES, ALBERT F. RYAN, JOHN KARDOS, TIMOTHY J. O'DONOVAN, MARTIN J. URBAN, LOUIS G. FONTENOT, JACQUES H. BLANCHARD, ROBERT O. MEDLOCK, MONICO DAVIS, ATHENS WALKER, JOSEPH A. BARON, MELVIN JAMES, JOE W. THROWER, JUNIOUS McCALL, HAROLD F. McLEAN, JOSEPH H. BOLAND, THOMAS W. CHASTAIN, JR., PHILIP AUSTER, MAURICE C. LEBLANC,

Plaintiffs-Appellees,

against

TEXACO INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT, TEXACO, INC.

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Preliminary Statement

This is an appeal by the defendant-appellant, Texaco, Inc. from a judgment (A 125) entered in favor of the thirty-two plaintiffs-appellees against defendant awarding each plaintiff-seaman a sum equivalent to one month's wages pursuant to 46 U.S.C. § 594 in addition to wages actually earned by them while employed by Texaco, Inc.

as unlicensed crewmembers aboard the S/S "TEXACO ILLINOIS" and also awarding plaintiffs interest on the judgment and counsel fees in the sum of $5,000.

The aforementioned judgment was entered on January 15, 1975 by the Clerk of the United States District Court, Southern District of New York following a non-jury trial in that Court on October 29, 1974, Honorable Constance Baker Motley, United States District Judge presiding. Following the non-jury trial before the Court on October 29, the Court orally dictated its findings and conclusions from the bench (T.T. pp. 201-204).* However, the Court permitted the filing of post trial briefs and proposed findings of fact and conclusions of law. Following the filing of the same, the Court rendered a nineteen page written opinion (A 101-124) embodying its oral findings and conclusions dictated from the bench and also therein awarding plaintiffs interest and counsel fees. This appeal is taken from both the oral findings and conclusions and the written decision of the Court dated December 18, 1974 insofar as the legal points hereinafter raised pertain to same.

Following rendition of the Court's decision and entry of judgment, Texaco, Inc. timely moved for an order requesting amendment of the Court's findings and conclusions or alternatively for a new trial. The Court in a memorandum decision endorsed on defendant's notice of motion (A 152) denied defendant's motion. This appeal is also taken from the order denying this motion.

This appeal also brings before this Court several matters, preliminary to the trial and post-trial proceedings:

(a) A motion for summary judgment was served by plaintiff's counsel dated November 29, 1971 and in a mem-

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* T.T. is a reference to the pages of the trial transcript and exhibits which is printed in its entirety in the rear of the appendix and has been given the same page numbers in the appendix as supplied by the Southern District Court Reporters.

orandum opinion by United States District Judge MacMahon dated February 7, 1972 (A 65-68), the motion was denied, in essence stating that each plaintiff's "state of mind" was in issue as a question of fact *upon which the defendant has the burden of proof.* During the course of the actual trial of the litigation, the Court held Judge MacMahon's decision to be controlling as having framed the issues to be tried (T.T. 25-27). Insofar as the trial judge has held the decision on the motion for summary judgment to be binding and insofar as certain parts of that decision vary from the legal issues hereinafter raised, Texaco, Inc. also appeals of necessity therefrom.

(b) At the time Texaco, Inc. interposed its answer, it simultaneously served and filed a notice of taking the deposition of the thirty-two individual plaintiffs. A motion for a protective order was made by plaintiff's counsel (A 11, 12) and the motion came on before United States District Judge Gurfein, for a hearing. Judge Gurfein referred same to United States Magistrate Goettel to hear and report. The United States Magistrate in a report dated November 23, 1971 recommended that defendant be given the opportunity to depose a certain number of the plaintiff-crewmembers in a manner as set forth in his report (A 26-31). District Judge Gurfein in an order dated December 2, 1971 (A 25) confirmed the Magistrate's report but immediately thereafter and following the filing of plaintiffs' motion for summary judgment stayed by order dated December 3, 1971 (A 32) the taking of the depositions pending determination of the motion for summary judgment. As noted above the summary judgment motion was decided adversely to the plaintiffs but with the Judge holding that state of mind was an issue to be proven by defendant. Following the decision on summary judgment defendant obtained depositions of only two plaintiffs. Thereafter it moved before Judge Motley for an order striking plaintiffs' complaint for failure of the remaining plaintiffs to appear for the taking

of their depositions (A 69, 70). The Court in an order dated November 6, 1972 (A 87) denied this motion even though the determination on plaintiffs' motion for summary judgment held that the onus was upon defendant to establish state of mind of these plaintiffs. Thus defendant also appeals from the order of Judge Motley dated November 6, 1972 insofar as it worked substantial prejudice upon it and denied defendant the right to depose the remaining thirty plaintiffs.

One final preliminary matter should be considered before embarking upon a recitation of the relevant facts and a discussion of the issues. While the "clearly erroneous" rule under F.R.C.P. 52(a) is applicable, there is ample authority in this Circuit holding that it is not as rigidly enforced when the trial of the litigation in the District Court proceeds chiefly upon deposition testimony as is the case here. Only one live witness, Mr. John McCarthy of Texaco, Inc. called by the defendant testified (T.T. 151-190). Thus the District Court at trial had no better opportunity than does the Circuit Court now to judge credibility and demeanor of the witnesses. *Bannister* v. *Solomon,* 126 F2nd 740 (CCA 2nd 1942), *Orvis* v. *Higgins,* 180 F2nd 537 (CA 2nd 1950) cert. den. 340 U.S. 810, 71 S. Ct. 37. Thus it is submitted to the Court that a review tantamount to an appeal *de novo* may be conducted of the record.

The Facts

Certain basic facts concerning the events comprising the subject matter of this lawsuit are not in dispute.

Plaintiffs, thirty-two in number, represent the entire unlicensed crew of the S.S. "TEXACO ILLINOIS" who have brought suit against its owner, Texaco, Inc. to recover one month's wages as the result of a claimed improper discharge from foreign articles in violation of 46 U.S.C. § 594. On January 6, 1971 plaintiffs signed foreign articles before

the United States Shipping Commissioner in Miami, Florida for a voyage as described in the articles (T.T. 208 209) from "the Port of Port Everglades, Florida, to one or more ports in the Gulf and/or Caribbean and Panama and thence to one or more ports on the Pacific Coast of the continental United States, exclusive of Hawaii and Alaska, to a final port of discharge on the Pacific Coast of the United States, for a period of time not exceeding ninety (90) days." Thereafter, the vessel, while still in the Caribbean, was diverted to the Port of Trinidad and returned to the Continental United States at Taft, Louisiana whereat the foreign articles were closed on January 21, 1971. The "TEXACO ILLINOIS" thereafter continued in the regular service of Texaco and proceeded on a coastwise voyage up the East Coast of the United States. The plaintiffs, save six as noted on defendant's exhibit E in evidence (T.T. 213) all remained aboard the vessel and continued in its employ in the same rating at the same rate of pay beyond the required one month had they been continued upon foreign articles.

The facts that are controverted are mainly those surrounding the occurrence of the events at the time of the sign off from foreign articles on January 21, 1971. The United States Coast Guard Shipping Articles on an official Government form (form C.G. 706 A, rev. 9/46) prepared and issued by the United States Government pursuant to 46 U.S.C. § 712 covering the "TEXACO ILLINOIS" were received in evidence as defendant's exhibit A (T.T. 208, 209). The last page of the subject shipping articles entitled "Particulars of Discharge," in the second from last column in bold heavy black type contains the legend "RELEASE". Thereunder contains the printed wording of the release under which each plaintiff has signed and in the last column the Deputy Shipping Commissioner Wilbur Ball the authorized Government representative presiding at the sign off aboard the TEXACO ILLINOIS has attested each signature. The United States Government release reads

as follows:

> "We the undersigned seamen do hereby each one for himself by our signatures herewith given in consideration of settlements made before the shipping commissioner, release the Master and owners from all claims for wages in respect of this voyage or engagement, and I, the Master, do also release each of the undersigned seamen from all claims, in consideration of this release signed by them."

The basis for the discharge is denoted in column three on this same page as "MC" which stands for mutual consent. No protest was noted on the articles which is the usual custom and practice when there is a dispute and both Deputy Shipping Commissioner Ball and Captain Verner Claybourn, the Master of the "TEXACO ILLINOIS" testified that no protest was made by the crewmembers to them (T.T. 105, 106, 91).

One of the two depositions that was obtained by Texaco in this litigation was that of Joseph Boland the substance of which was read into the record on the trial (T.T. 29-80). Boland was ship's chairman aboard the vessel and a thirty-three year member of the National Maritime Union (T.T. 30). Boland testified that he informed both the deputy shipping commissioner and the Captain that they were signing off under protest (T.T. 37-38), this despite his own letter of January 31, 1971 addressed to union headquarters in New York received in evidence as defendant's exhibit B (T.T. 210) wherein he stated that he had consulted with union officials before the sign off and even those officials believed that "penalty pay would not be possibly payable."

The Statute

The cause of action asserted in this litigation by plaintiffs' complaint (A 4-8) arises under section 594 of 46 U.S.C., Revised Statutes of the United States § 4527 com-

monly known as the Merchant Seamen's Act of June 7, 1872, C 322, § 2117 Stat. 366.

The Statute provides as follows:

"§ 594. Right to wages in case of improper discharge

Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case of having been improperly discharged, recover such compensation as if it were wages duly earned. R.S. § 4527."

The legislative history of this section clearly indicates that it was never intended to countenance the incurrence of an unjust enrichment on the part of seamen, but was directed to remedy a wrong done to seamen in the form of an improper discharge when the seaman has, in fact, sustained an *actual loss* through an actual discharge. Moreover, the historical setting under which this section was enacted presented at that time, a scenario of abuse directed against the "poor sailors" at a time before the dawn of the powerful labor unions as they presently exist. Today, these seamen are represented by one of the most powerful labor unions in this Country, the National Maritime Union. Suffice to note that the very suit herein has been brought by the renowned Admiralty law firm of Abraham E. Freedman, which office is general counsel for that union. Moreover, it is submitted that it is the distortion of well meaning Maritime Statutes such as the instant one throughout a century of case decision that has, amongst inumerable and unmeasurable other reasons, re-

sulted in the erosion that today besets the American Merchant Marine and its competitiveness in the world market.

The legislative history for 46 U.S.C. § 594, 17 Stat. 266 known as the "Act of June 7, 1872 to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States to Superintend the Shipping and Discharge of Seamen Engaged in Merchant Ships Belonging to the United States and for the Further Protection of Seamen" (Chap. CCCXXII, Forty-Second Congress, Session II (Ch. 321, 322) clearly indicates that the subject section of the Act was enacted to remedy wrongdoings existing in discharges by shipowners and never intended to penalize or charge a shipowner for a double wage where a seaman continued in his employ, interrupted only by a "paper fiction" discharge from foreign articles. The Act, and particularly the subject section, arose out of House of Representatives Bill #2044 and various amendatory bills, mainly HR #3365, 3689 and 3652. It should be noted to the Court that this history was located only after an extensive search of the microfilm files of the New York Public Library pertaining to the Forty-Second Session of Congress, 1872.

Representative Conger was the proponent of this Act which was opposed by Representative Wood.

Excerpts of some of Representative Conger's remarks in general support of the bill and as contained in the Congressional Globe Session I—1872 at pages 2176-77 are illuminating and read as follows:

> ". . . articles from every leading New York paper depicting the horror, the infamy, the degradation, the destruction of health and morals and life and reputation, and of the property which should go to the children of these sailors."
>
> (I urge) ". . . Congress not to stay its hand in ameliorating the condition of these people but to pass the bill . . ."

Mr. Wood, while opposing the bill on economic reasons stated in the Congressional Globe, Session I, 1872 at page 2173 in support of its purpose:

> ". . . the chief ground upon which this bill has been presented to the House and upon which, I believe its passage is mainly advocated is that it is to do away with the abuses which to a certain extent we all admit to exist with reference to the *poor sailors.* It is said and there is great truth in the statement that the sailors now have none to care for them; that they pursue lines of toil, of trial and of danger for a *compensation which is* almost nothing; and that their feet no sooner touch the sail than they become the victims of those who stand ready to prey upon them; who take from them fraudulently and sometimes violently their hard earnings, and then destroy as far as possible, their moral, mental and physical powers, in order to hold absolute control over them until they again ship to go upon the perilous deep. Anything, Mr. Speaker, which would do away with these great abuses; any measure which will protect the sailor from these exactions, these compositions, these cruel outrages which are continuously perpetrated upon him, will meet my hearty support . . ." (emphasis supplied)

Mr. Conger continues at page 2177 of the same Congressional Globe as follows:

> "It is only in the case of those vessels that go to foreign countries—those vessels that go forth upon unknown and distant seas, beyond the reach of our laws, and beyond the protection of our own officers of the law that the provisions of this bill are necessarily enforced.
>
> . . . for those vessels that are going beyond the reach of our laws, which go forth upon the high seas beyond our jurisdiction, there shall be thrown around the

sailor the protection of the law, the muniments of such an act as this for his defense and the defense of the family and his children."

It is submitted that the legislative purpose is clear from the above quoted excerpts and indicate that the entire Act, and in this situation particularly Section 594, never was intended to provide a "windfall" to these plaintiffs but to ameliorate wrongdoings perpetrated by shipowners.

POINT I

The release and mutual consent contained on the shipping articles is prima facie valid in the absence of fraud or coercion and bars recovery by the plaintiffs herein.

The Court received in evidence as defendant's exhibit A (T.T. 208-209) the shipping articles for the S.S. "TEXACO ILLINOIS" which as noted in the foregoing statement of facts on its discharge page contains a column indicating mutual consent sign off by the unlicensed plaintiffs and a signature column with a release at the top.

It was determined in the District Court's decision on summary judgment which determination as noted above was adhered to by the trial judge throughout the trial that the burden of establishing the release and mutual consent termination went beyond simple introduction of the executed release and mutual consent into evidence and that this burden was solely upon defendant. In other words, the District Court also required defendant to prove "state of mind" stating in effect that this was a seaman's release and the principles applicable to proof of a seaman's release were applicable here.

Garrett v. *Moore McCormack Company, Inc.*, 317 U.S. 239 (1942), *The S.S. "Standard Bonici"* v. *Standard Oil Co. of New Jersey*, 103 F 2nd 437 (2nd Cir. 1939). It is

against this basic principle that defendant assesses its first claim of error.

The "Texaco Illinois" initially opened these foreign articles to make an intercoastal voyage from a United States port in the Gulf of Mexico to a United States port on the West Coast of the United States. Under normal circumstances a United States coastwise voyage does not require foreign articles at all but simply what are known as "Masters" or "Coastwise" aritcles (46 U.S.C. 544). It is only for the archaic and today literally pointless statutory requirements that intercoastal voyages proceed under such foreign articles that these articles were opened in the first place. During the course of the trial, the trial judge made the observation that section 594 was not one of the sections or requirements of law noted on the first page of defendant's exhibit A, the shipping articles (T.T. 154-156). It has been Texaco's position throughout this litigation that the requirements for having foreign articles, the manner, form and content of the articles themselves and the very release itself (46 U.S.C. § 644) contained in the Articles are obviously not Texaco's own doing. The Articles including the release and the language thereof are a United States Governmental publication and requirement and the procedures at sign on and sign off are performed before a United States Shipping Commissioner or his duly authorized deputy. Thus the taking of this release is completely unlike the taking of a seaman's release, for example, in a personal injury action by a shipowner's claims man in the shipowner's office towards which the principles of cases such as *The S.S. "Standard Bonici", supra,* and *Garrett. supra* are duly directed. In effect, this is not a shipowner's release at all but a Government release. It, by its very terms, not only releases the shipowner but the seamen, as well. The release on the articles, in fact, is not taken by the shipowner but by the shipping commissioner present at the sign off, in this case Deputy Wilbur Ball (T.T. 97-118). Moreover, not only was a

United States Deputy shipping commissioner present but the crewmen were represented aboard the vessel by an official of their union, one Thomas F. Mauricio, from whom they solely sought advice. Certainly the circumstances of overreaching of seamen including fraud and coercion for which the principles annunciated in *The S.S. "Standard Bonici", supra,* and more particularly the *Garrett* case, *supra,* are applicable, are not and could not be present here. These last cited cases are not even cases involving releases contained in ship's articles.

It is submitted that United States Judge Pollack of the United States District Court, Southern District of New York perceived this very distinction in the case of *Jones* v. *American Export Isbrandtsen Lines, Inc.,* 285 F. Supp. 345 (S.D.N.Y.—1968), a case specifically involving a release taken under foreign articles wherein the Court stated at page 349:

> "It has been held that a seaman's release, executed in the presence of and attested to by a United States Shipping Commissioner, in the absence of a showing of fraud or coercion, is valid. Jensen v. Barber S.S. Lines, 110 Misc. 632, 180 N.Y.S. 754 (Mun. Ct., Man. 1st Dist. 1920). Although this Court has the power to set aside the release for good cause shown 'as justice shall require' (46 U.S.C. § 597), there has been no showing that the will of the libellant was overborne or that unfair advantage was taken of him."

Therefore the test is not state of mind or awareness of what each seaman was doing at all but whether the shipowner obtained the release by fraud or coercion.

The burden is therefore properly upon the plaintiffs and not defendant to show that "the will of the plaintiff was overborne or that unfair advantage was taken of him" *by Texaco.* This burden, they clearly have not sustained herein. Captain Claybourn specifically told the plaintiffs

how he would pay off (T.T. 84-85) and this information was subsequently relayed to their union delegate on the vessel, Mauricio. The Union Delegate left the vessel before commencement of the sign off and evidently obtained instructions from a superior union official by the name of George (T.T. 122-123). At this point, the finding of fact of the District Court contained on page 6 of its opinion (A 106) becomes relevant and defendant submits is clearly erroneous. The District Court stated that "it holds that the oral protest to the Captain by plaintiffs' union representative was sufficient, and since plaintiffs did not know of their rights no individual protest by them was required."

It is submitted that this finding of fact which is at the crux of the factual findings of the District Court is in error for two reasons:

(a) The testimony of plaintiffs' key witness, Boland, the ship's chairman indicates that he fully knew the unlicensed crew's rights under § 594 because he was the prime mover behind this entire affair well before the vessel ever reached Taft, Louisiana (T.T. 32, 34. 35, 45, 47 *et seq.*) In fact, in hindsight it would appear from the record that Boland was the only person who truly did understand section 594. The District Court "strained" to find an alleged protest made to the Captain by the union representative as sufficient despite the fact that Boland's testmony indicates he fully understood the need to protest and did protest the sign off to both Captain Claybourn and Deputy Shipping Commissioner Ball (T.T. 37). Boland, incidently, is no novice seaman sailing under foreign articles having testified that "* * * I have been in that racket a good many years, and I have signed a lot of articles in my life * * *" (T.T. 45). Evidently the trial court in its findings chose not to accept his credibility on this point for it strained to find the alleged protest indirectly made through the Union official. It is submitted for good reason the District Court chose not to accept Boland's testimony regarding the protest he is alleged to have made, inasmuch

as both the Deputy Shipping Commissioner, Ball, who is the only true impartial witness in this entire lawsuit and Captain Claybourn both testified unequivocally that *no protest* was made to them (T.T. 105, 106, 91).

Moreover, the Court seemingly contradicts its own findings on page 6 of the opinion (A 106) that Mauricio made a protest to Captain Claybourn when it states on page 9 of its opinion (A 109) that "When plaintiffs were preparing to sign off, a union representative, Tomas (sic) F. Mauricio, came on board to see whether the men had any complaints. *There were no complaints, only queries about the extra 30 days' pay* * * *" (emphasis supplied). Furthermore the trial Court's oral findings dictated from the bench at the conclusion of the non-jury trial (T.T. 203-04) appear to clearly contradict the testimony given at the trial. The trial Court recites the following (T.T. 203):

> "The Court finds that the plaintiffs did not consent to the termination of the voyage, they knew *nothing* of their rights, *contrary to the testimony of these union officials,* and they did not waive their rights by continuing or accepting this coastwise voyage."

Continuing on the following page the Court stated (T.T. 204):

> "The Court finds, *despite the testimony,* that they did not know their rights, that this occurred to somebody after they got off of there, and they cannot waive any right that they do not know about." (emphasis supplied)

It is submitted that all these last mentioned findings are clearly erroneous and not in conformity with the testimony in the record on legal principles applicable to releases taken under shipping articles.

(b) The second reason that the District Court's aforementioned findings are clearly erroneous, if indeed, that

be the appellate review standard as noted in the preliminary statement, is that it is inconceivable based upon an item of documentary evidence, namely exhibit B (T.T. 210) as to what possible reason Mauricio would have had to protest. There is no question but that on his deposition which became part of the trial transcript he testified he protested to the Captain (T.T. 126). This is so even though he testified earlier that it was one of his specific duties in case of a dispute to tell the crew to protest *to the Commissioner* (T.T. 124). Mauricio stated that the basis of his protest was the instructions he received during the telephone conversation he had from the dock with the union official, one, Mr. George (T.T. 124). However, defendant's exhibit B in evidence clearly appears to belie this story. Exhibit B is the letter written by Boland and the two other union delegates to their National Headquarters in New York dated January 31, 1971 subsequent to the discharge wherein contrary to Mauricio's testimony that union official George instructed him to protest, it indicates in paragraph 4 thereof that "Brother George gave his opinion that *there was no beef and penalty pay would not be possibly payable*" (T.T. 210).

The importance and evident need for the formal protest to establish absence of consent under section 594 is pointedly illustrated by the Third Circuit Court of Appeal's decision in *Newton* v. *Gulf Oil Corp.*, 180 F.2nd 491 cert. den. 71 S. Ct. 42, 340 U.S. 814, 95 L. Ed. 598. In *Newton* the facts as related by the Court were as follows (180 F.2nd at p. 492):

> "The facts are simple and undisputed. These libelants and others signed shipping articles between May 1 and May 4, 1948, for a voyage on the S. S. Gulfmoon from New York to 'one or more ports in Venezuela * * * for a term of time not exceeding three calendar months.' The ship did not go to Venezuela, but went, instead, from New York to Harbor Island, Texas, and

> returned to Philadelphia. The date of return was on or about May 15, 1948. On May 15 the articles were terminated and the seamen were signed off. Each man received his earned wages for the voyage. [They protested and demanded the statutory one month's pay to which they claimed to be entitled. Upon this being refused, suit was brought to recover and the seamen won in the District Court. D.C.E.D. Pa. 1949, 87 F. Supp. 210.] * * *"

Evidently the Court in *Newton* accepted the defendant-libelee's contention that lack of consent in the face of the mutual consent column contained on the shipping articles was a burden to be carried by the plaintiffs-libellants in stating at page 492:

> "* * * The libelee makes some argument about the necessity of showing lack of consent. We think that is answered by the protest made by the men at the time they were signed off."

That burden was found by the Court in *Newton* to have been discharged by establishment of the protest noted on the Articles and which was footnoted by the Court on page 492 of its opinion. No such burden has been discharged by these plaintiffs herein.

In substance, therefore, both the District Judge in his decision on summary judgment and the trial Judge in the oral and written decisions constituting the findings of fact and conclusions of law committed substantial prejudicial error in holding that Texaco in essence could not sustain is burden of proof by merely putting in the Articles containing the mutual consent termination and release which contained no protest. It held Texaco had to establish more, namely plaintiffs' state of mind before it could prevail on its affirmative defenses of termination upon mutual consent and release. Moreover, the factual determination of the trial Judge that there was a protest of some kind

is not supported by the record, clearly erroneous and insufficient in any event to refute Texaco's *prima facie* proof of mutual consent and release.

* * *

One further assessment of prejudicial error appellant desires to cover at this point as it is so interrelated to this first legal issue. As noted in the preliminary statement herein a part of this appeal stems from an order (A 87) of Federal District Judge Motley dated November 6, 1972 denying Texaco's motion (A 69, 70) to strike each plaintiffs' complaint who had not as yet testified or alternatively to compel those plaintiffs to testify. This motion was made well after Texaco had received Judge Gurfein's order permitting Texaco, based upon the report of Magistrate Goettel, to take a substantial number of these plaintiffs' depositions in a proper and orderly manner and this motion also was made well after the decision of Judge MacMahon on the motion for summary judgment that required Texaco whether correctly or incorrectly as part of its evidentiary proof to establish the so-called "state of mind" of these plaintiffs on both the issues of mutual consent and release. There was no question in counsel for Texaco's mind that to establish such proof, if indeed it be required to do so, could only be done through oral depositions. It is almost self-evident that "state of mind" cannot be probed through written interrogatories. Nevertheless, having these earlier determinations of Magistrate Goettel, Judge Gurfein and Judge MacMahon before it, the trial Judge denied the motion of Texaco to obtain these depositions and directed in its order of November 6, 1972 (A 87) that Texaco take only the depositions of the Deputy Shipping Commissioner and the Union Representative. While the Court did state that it would rule "on the necessity for taking any further depositions of the plaintiffs," what further necessity could Texaco establish for taking these plaintiffs' depositions than what it had already made out in its motion papers (A 69, 70) regard-

ing "state of mind" which resulted in Judge Motley's order of November 6, 1972. It is therefore submitted that if Texaco as part of its proof was to be required legally to establish "state of mind," denial of what was already its *second* motion to compel depositions of these plaintiffs (the first being the motion before Judge Gurfein) worked substantial injustice and prejudice to its case and, assuming *arguendo,* that it is now affirmed that it must establish "state of mind" to prove its affirmative defense of mutual consent and release, it then should be afforded a new trial and preliminarily accorded the opportunity to orally depose *all* the plaintiffs.

POINT II

The Statute, 46 U.S.C. § 594, as employed to the facts of this litigation is unconstitutional.

At the outset of this point, it should be noted that Texaco does not quarrel with the legislative purpose and intent of the Statute in question, which, as noted under an earlier heading in this brief, is one to afford a simple, summary method of establishing and enforcing damages in a liquidated form when there occurs a true and *de facto* termination of employment. However, it strenuously contends that where there is an effort to employ the Statute perniciously to obtain a literal windfall such as on the facts as presented herein where the vast majority of the plaintiffs remained aboard in their same maritime capacity at the same rate of pay, it thus violates all traditional standards of due process and fair play. Moreover, as the majority of the unlicensed crew, save for the six mentioned above,* have not lost any wages whatsoever and have been fully paid by Texaco for their con-

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* As to these six, Texaco, nevertheless contends they are also barred from recovery by reason of their mutual consent termination and release as covered in Point I of this brief.

tinuation in its service aboard the "TEXACO ILLINOIS," the effect of the Statute under these present circumstances amounts not to liquidated damages, but the imposition of a penalty upon Texaco, an unjust enrichment and windfall to the plaintiffs and a deprivation of the property rights of Texaco, Inc. without due process and equal protection of the laws.

The Statute imposes as liquidated damages a sum equivalent to one month's wages in addition to the earned wages made by each seaman up until the actual termination of the voyage. As a condition precedent to such imposition, there must be an abandonment of the voyage and a discharge. *The Steel Trader,* 275 U.S. 388, 48 S.Ct. 162, 72 L.Ed. 326, *Vlavianos* v. *The Cypress,* 171 F.2nd 435 cert. den. 337 U.S. 924, 69 S.Ct. 1168, 93 L.Ed. 1732. While there has been an abandonment of the voyage intended herein, the discharge of the crew in the form of closing of the shipping articles is merely a paper fiction and should be treated as such. It has been held that where there has been in legal contemplation no *actual* discharge, extra wages are not recoverable therefor. *Hughes* v. *Southern Pacific Co.,* 274 Fed. 876. Certain cases have considered the situation, similar to the one herein, where the crew remained on board and sought the additional wages as provided for under Section 594. See, for example, *The John R. Bergen,* 122 Fed. 98 (D.C.N.Y. 1903). *Newton* v. *Gulf Oil Corp., supra, Lunquist* v. *Seatrain Maryland,* 359 F.Supp. 663 (D.C.M.D.—1973). All these decisions, however, dealt with the question of waiver by the seaman of his rights under this Statute by continuance in the owner's employ. None have been found that raise the constitutional validity of the Statute where the seamen, except for the paper discharge from foreign articles, continue in the shipowner's employ at the same rate of pay and in the same capacity. To construe the Statute in this light is no longer to use the Statute as a simple, summary method of establishing and enforcing liquidated

damages, but is now to impose a penalty upon the shipowner in the form of double wages. Such an imposition under the circumstances presented herein violates all concepts of constitutional due process and fairplay.

This misdirection of the Statute to what the defendant believes are constitutionally invalid grounds has apparently arisen as a result of the contentions more directed to the doctrine of *waiver* of the seaman's rights by continuing in the shipowner's employ than to the effect of the application to the circumstances as are represented here. It is submitted that inasmuch as the seaman is fully compensated by remaining in the shipowner's employ, he thereupon suffers no injury or loss which entitles him to additional compensation in the form of liquidated damages under Section 594, and the matter should not turn on the issue as to whether he is waiving a right (a right defendant contends he does not have in any event until he has sustained an actual loss by true loss of employment), but upon whether in fact he has sustained any *actual loss.*

It is submitted that the trial Court's finding of fact is clearly erroneous and its conclusion of law commencing with subsection 3 in its written opinion following trial (A 112-116) on the Constitutional issue is in error. The Court also states on page 13 of its opinion (A 113) that "Defendant agrees, however, that where seamen have sustained lost wages through the termination of a voyage without their consent and through no fault of their own, the Statute is properly applicable, and the injured seamen are limited to the liquidated damages decreed by the statute *regardless of their actual loss*" (emphasis supplied). As noted in defendant's post-trial motion to amend the findings and conclusions or for a new trial (A 127-151 at A 149-150) defendant makes no such concession as to that part of the Court's finding that is underlined. It is precisely when there is *no* actual loss that defendant contends that constitutionally permissible bounds are transcended

by this statute. Moreover, the appellant assigns error to the District Court's statement on page 14 of its opinion that "Such a contract provision is not unconstitutional since it is *remedial* and not punitive." In the situation such as here, where all but six crewmembers remain in defendant's employ how can the subject statute be said to be remedial of any wrong? Moreover, the legislative history of the statute as reviewed earlier in this brief under a separate heading clearly implies that the statute was never intended to be employed in the situation where there is no real loss or damage occurring to these seamen.

While the Statute has been before the United States Supreme Court as noted above in *The Steel Trader, supra,* the constitutional validity of the Statute has never apparently been tested. The opportunity to do so under the circumstances as presented herein was not evidently present in *The Steel Trader* for in that case, the seamen were, *in fact,* discharged and without employment and had, therefore, suffered an actual loss. Therefore, the Statute in that case provided a proper and ready remedy of liquidated damages to *The Steel Trader* crew. Thus, it most likely was a constitutionally valid application of the Statute in *The Steel Trader,* but would, it is submitted, be a constitutionally invalid application if imposed herein. It has been stated that a Statute may be constitutional in itself but unconstitutional in its application to a given set of circumstances, *Lovelace* v. *United States,* 357 F.2nd 306; that a law which is constitutional as applied in one manner may contravene the Constitution as applied in another, *Lovett* v. *United States,* 66 F.Supp. 142, 104 Ct. Cl. 557 affd. 66 S.Ct. 1073, 328 U.S. 303, 90 L.Ed. 1252; that a Statute not objectionable on its face may be adjudged unconstitutional because of its effect in operation, *Bennett* v. *Cottingham,* 290 F.Supp. 759; that a Statute constitutional on its face may not be used for unconstitutional purposes or with unconstitutional results.

Application of Middlebrooks, 88 F.Supp. 943 revsd. on other grounds 188 F.2nd 308 cert. den. 72 S.Ct. 90, 342 U.S. 862, 96 L.Ed. 649.

Moreover, as a general rule of damages, penalties such as the one that would, in effect, be imposed herein are clearly not favored by the Courts when it appears that *no actual* damages have been sustained. *Schnoll* v. *United States,* 91 Ct. Cl. 1. Under principles of general contract law, it is universally stated that a provision in a contract for liquidated damages will be enforced only if, in reality, it calls for liquidated damages and not a penalty, but if a penalty is in fact provided for, it will not be enforced and the injured party will be entitled to recover *only the actual damages suffered. Steffen* v. *United States,* 213 F.2nd 266.

In *Superior Laundry Co.* v. *Rose,* 193 Ind. 138, 137 N.E. 138, it was contended that provisions of a Statute which prescribed a penalty of ten per cent of the unpaid wages for each day they remain unpaid after they become due as "liquidated damages" for the failure to pay them at the time they were due, denies the employer the equal protection of the law and deprives him of his property without due process of law. The Court upheld the employer's claim on both equal protection and due process bases.

In *State* v. *Martin,* 193 Ind. 120, 139 N.E. 282, the Court stated that a Statute becomes unconstitutional, although it even may operate upon all individuals and corporations alike, if it subjects an individual or entity to an arbitrary and unreasonable exercise of the powers of government by asserting penalties greatly out of proportion to the actual damages sustained with the end result that the individual or entity is unduly oppressed. In the case at bar, except for the provisions of the Statute in dispute, no *actual damages whatever* have been sustained by these

plaintiffs. See further, the annotations at 26 ALR 1386, 1392 and at 12 ALR 612. Furthermore, the fact alone that the Statute in question singles out and is made applicable only to shipowners, would unquestionably appear to make it arbitrary and discriminatory and deny defendant due process and the equal protection of the laws.

POINT III

The award of counsel fees and interest should not be sustained.

The trial Court awarded plaintiffs, counsel fees in the sum of $5,000. As is indicated by the facts as related under Point I hereof, the refusal of Texaco to pay the statutory sum sought cannot in any manner or to any extent be considered arbitrary, unreasonable or recalcitrant under the principles as stated in *Vaughan* v. *Atkinson,* 369 U.S. 527. Counsel fees have never before been awarded under any circumstances in a section 594 case.

In the instant case, there is no evidence to support a finding that the withholding of the section 594 sum was the result of Texaco's bad faith. On the contrary, there is substantial evidence as has already been noted and further hereinafter to be noted to support a finding that Texaco based the withholding upon an honest, good faith belief that plaintiffs were not entitled to this sum. *Hollingsworth* v. *Maritime Overseas Corp.,* 363 F. Supp. 1393 (D.C. Penn. —1973), *Richard* v. *Bauer Dredging Co.,* 433 F.2nd 954 (C.C.A. 5—1970), *Constance* v. *Johnston Drilling Co.,* 422 F.2d 369 (C.C.A. 5—1970), *Blouin* v. *American Export Isbrandtsen Lines Inc.,* 319 F. Supp. 1150 (D.C.N.Y.— 1970).

The District Court's findings of fact to support the legal conclusion of arbitrariness and recalcitrance on the part of Texaco are clearly erroneous and without foundation in

the entire record. Moreover, the reason cited by the Court for the award of counsel fees on page 18 of its opinion (A 118) that the "average seaman might be forced to forego his legal remedy" is not at all the state of facts present herein. These plaintiffs are in this lawsuit acting through a very powerful labor union the National Maritime Union of America and are represented by the office of that union's general counsel, Abraham Freedman, Esq. There is not one scintilla of evidence in the record that these plaintiffs are being charged a legal fee. Even though there is a substantial affidavit from attorney Ned Phillips, Esq. as to the legal work performed (A 95-100), there is no mention as to what, if anything, these plaintiffs will be charged for any recovery made. Furthermore the same reason given by the District Court, as quoted above, might also discourage a shipowner from litigating an issue such as this especially when there are many factual questions in dispute such as here. What the trial Court seems to be stating is that because it has lost the lawsuit, Texaco, in hindsight was arbitrary, capricious and unreasonable in its refusal to pay. However this entire affair was not a simple matter and took a lengthy opinion of the District Court to endeavor to remedy.

Moreover, the Union itself whose attorneys are bringing this suit is not without responsibility. Texaco, through its labor relations superintendent, Mr. John McCarthy, contacted a union representative at the National Maritime Union headquarters in New York on or about January 19, 1971, two days before the actual sign off and when he inquired if there would be any problem or dispute concerning the articles was advised by that representative that he would check it out and *get right back* well before the scheduled sign off. But McCarthy, in fact, received no response until several days after the sign off was completed at which time another representative informed him

that he had "a problem" (T.T. 163-165). The National Maritime Union was fully aware that the crew was complaining of the alleged problem over termination of the articles well in advance of the date of actual termination of the articles on January 21, 1971. The aforementioned silence of the Union until well after the sign off had been completed coupled with the actual advices at the time of sign off from Mr. George of the plaintiffs' own union given through Mauricio as noted in Point I hereof to the affect that the crewmembers were not entitled to the additional one month's sum (also see exhibit B [A 210]) all clearly indicate that Texaco's actions in this matter were anything but arbitrary and unreasonable.

The entire record undisputedly reflects that Texaco was not dealing merely across the board with the so-called "poor, uneducated, uninformed seaman" who can only look to the Admiralty Courts as wards for their protection. What, in effect, it was dealing with was a concerted union members' action to gain the extra 30 days windfall when the union officials themselves at the time of sign off evidently agreed, as reflected by exhibit B, that their members were not entitled to this sum. Individuals and entities such as Texaco who deal with a union are justified in relying on the words and actions of its representatives acting within the scope of their union authority. *Lowe* v. *Feldman,* 11 Misc. 2nd 8, 168 N.Y.S. 2nd 674 affd. 6 AD2nd 684, 174 N.Y.S. 2nd 949. Moreover, it should be sufficient to note that at the time of the enactment of the subject statute to remedy the wrongs done to seamen in the 1800's, labor unions were virtually unknown and certainly did not exist to any extent in the maritime industry.

For the foregoing reasons the award of interest which is discretionary in admiralty as well as counsel fees should not be sustained.

CONCLUSION

The judgment in favor of the plaintiffs should be reversed and their complaint dismissed or, in the alternative the case should be sent back for a new trial.

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EARL B. LEWIS, ET AL.,

Plaintiffs-Appellees,

against

TEXACO INC.,

Defendant-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 25th day of July, 1975, he served two copies of the Brief of Defendant-Appellant on Abraham E. Freedman, Esq.

the attorney for the Plaintiffs-Appellees by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 346 West 17th Street, New York ( ) N. Y., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
25th day of July, 1975.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976